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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, Plaintiff, Cross-Defendant and Respondent, v. 1560 N. MAGNOLIA AVE., LLC, Defendant, Cross-Complainant and Appellant.	D052382 (Super. Ct. No. GIE030567)

APPEAL from a judgment of the Superior Court of San Diego County, Jan I. Goldsmith, Judge. Affirmed.

1560 N. Magnolia Ave., LLC, doing business as the Déjà Vu Love Boutique (Déjà Vu), appeals a judgment in favor of the County of San Diego (the County) on its complaint for injunctive relief and civil penalties for Déjà Vu's violation of a former ordinance regulating adult businesses, and against Déjà Vu on its cross-complaint for declaratory and injunctive relief. Déjà Vu contends the trial court erred by rejecting its

facial challenge to the ordinance based on its definition of an adult business as one that devoted a "significant or substantial portion" of its stock-in-trade or interior display space to adult items, or derived a "significant or substantial portion" of its revenues from such items. (San Diego County Ord. No. 9469, amending former § 1110 (hereafter § 1110).) Déjà Vu asserts section 1110 was unconstitutionally vague because the "significant or substantial portion" language provides neither adequate notice to those subject to its restrictions nor adequate guidelines for enforcement officers.

We conclude, however, that Déjà Vu lacks standing to pursue a facial challenge because there was no uncertainty as to section 1110's effect on it. To the contrary, the evidence showed that during the relevant period Déjà Vu was unquestionably an adult business within any reasonable definition of "significant or substantial portion" as more than 50 percent of its display space was devoted to adult items. (*Young v. American Mini Theaters, Inc*. (1976) 427 U.S. 50, 58-59 (*Young*).) Further, Déjà Vu lacks standing to pursue the interests of third parties because the ordinance's deterrent effect on legitimate expression under the First Amendment was not "both real and substantial," and the ordinance was "readily subject to a narrowing construction by the state courts." (*Id.* at p. 60.) We likewise conclude Déjà Vu's "as applied" challenge to section 1110 lacks merit.

Déjà Vu also contends the permanent injunction is unconstitutional to the extent section 1110 now defines an adult business as including one that derives 25 percent of its revenue from the sale of adult merchandise. Déjà Vu asserts the prospective use of revenue in determining whether it is an adult business is impractical and unfair because it cannot control what its customers buy on a given day. We are unpersuaded as there is

legal authority for the use of a revenue standard and there is no evidence the standard has been or will be applied unfairly. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2002 Magnolia opened Déjà Vu in a building leased from Tollis, Inc. (Tollis) and located within the County's commercial zone. At the time, section 1110 defined an adult bookstore as a business in which 15 percent or more of the retail floor space was devoted to the display of sexually-oriented books, magazines, videos, toys, novelties and the like. Déjà Vu fit the definition as it offered adult products exclusively.

Effective July 2002, the County amended its zoning ordinance to require that adult businesses be located in the industrial zone, rather than the commercial zone, and to allow any adult business lawfully established before May 15, 2002, to continue operating as a nonconforming use for an "amortization period." The County amended section 1110 to define an "Adult Bookstore, Adult Novelty Store[, or] Adult Video Store" as a "commercial establishment which has a *significant or substantial portion* of its stock-in-trade or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial

section of its sales or display space for the sale or rental" of adult items.[1] (Italics added.) Magnolia and Tollis unsuccessfully challenged the constitutionality of the amendment in federal court. (*Tollis Inc. v. County of San Diego* (9th Cir. 2007) 505 F.3d 935.)

Déjà Vu's amortization period expired on January 14, 2006. Déjà Vu opted not to relocate to industrially-zoned property. Further, it did not reduce its inventory of adult items. Rather, it added nonadult inventory such as lingerie and other clothing, shoes and jewelry to reduce the percentage of adult items offered in relation to nonadult items.

On January 17, 2006, the County inspected Déjà Vu and determined it was still operating as an adult business. On the same date, the County sued Déjà Vu for preliminary and permanent injunctions and civil penalties for violation of its zoning ordinance.[2]

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1 Section 1110 described adult items as: "(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations which are characterized by their emphasis upon the exhibition or description of 'specified sexual activities' or 'specified anatomical areas'; [¶] (b) Instruments, devices or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of the user or others." Section 1110 defined "Specified Sexual Activities" as "1. Sex acts including intercourse, oral copulation, masturbation, or sodomy; or [¶] 2. Excretory functions as part of or in connection with any of the activities set forth in 1." Section 1110 defined "Specified Anatomical Areas" as: "1. Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or [¶] 2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

2 The complaint also included the People of the State of California as a plaintiff on the UCL count, and Tollis as a defendant. Tollis was dismissed and is not involved in this appeal.

Déjà Vu cross-complained against the County. The second amended cross-complaint's first cause of action was for a judicial declaration that the County's enforcement action constituted an unconstitutional taking of its property without just compensation, and for damages. The second cause of action was for a judicial declaration that section 1110's "significant or substantial portion" standard was subjective and vague and violated their state constitutional rights to free speech and due process, and for injunctive relief.

On January 31, 2007, the County amended section 1110 to clarify that the "significant or substantial portion" standard means 25 percent or more.

On April 7, 2007, the court issued a preliminary injunction to restrain Déjà Vu from operating an adult entertainment establishment during the pendency of the action. On April 18, 20 and 27, county personnel conducted additional inspections of Déjà Vu. They determined Déjà Vu continued to operate as an adult business. After the April 27 inspection, however, Déjà Vu reconfigured the store and reduced its inventory of adult items to the County's satisfaction.

In pretrial proceedings, the court ruled Déjà Vu's takings claim was barred by the applicable statute of limitations. A bench trial commenced in October 2006, during which the parties' respective claims hinged on whether Déjà Vu was an adult business within the meaning of section 1110 between January 14 and April 27, 2006.

Lewis Balke, a county code enforcement officer, testified that on January 17 when he inspected Déjà Vu, 50 to 60 percent of the merchandise on Déjà Vu's first floor was adult-themed. Further, approximately 80 percent of the merchandise on the second floor

mezzanine, which was about one-third the size of the first floor, was adult-themed. Balke testified he believed section 1110's "substantial or significant portion" standard "fell somewhat under the same realm as majority, and [at Déjà Vu] about two-thirds of the entire business or more was adult-related; so I felt that it reached the threshold of significant."

Roger Espinosa, a former senior code enforcement officer for the County, inspected Déjà Vu on April 18, 1006. He testified that approximately 90 to 95 percent of the products displayed in the mezzanine were adult DVD's, VHS tapes and magazines. An area of the first floor contained several racks of DVD's for rent, and approximately 75 to 80 percent of them were adult-themed. The first floor also contained displays of adult toys and novelty items such as dildos, vibrators, penis rings and plastic vaginas and buttocks. Espinosa estimated that 60 to 65 percent of the first floor display space was devoted to adult items. On cross-examination, he estimated that on April 18 "approximately 85 to 90 percent of the items in the store . . . did constitute sexual gratification material."

Espinosa returned to Déjà Vu on April 19. He testified that the stairway to the mezzanine was roped off. Further, some adult items had been removed from the first floor and moved to the mezzanine. He revisited the store on April 20 and noted that most of the adult items had been moved to the mezzanine. The overall number of adult items had been reduced only "a little."

The County submitted numerous photographs taken inside Déjà Vu during Espinosa's inspections. Further, the judge visited the store at the commencement of trial and the parties stipulated that his observations were evidence.

Déjà Vu's manager, James Egizi, had testified during deposition that between January and April 2006, 95 percent of Déjà Vu's DVD's and 70 percent of its books were adult-themed. A Déjà Vu supervisor, Kirk Zea, had testified in deposition that during that time 100 percent of the products in the mezzanine were adult videos and magazines.

Peter Luster was a consultant for Déjà Vu. He testified that when the store first opened it carried only adult items. In his opinion, on January 14, 2006, at the end of the three-year amortization period, the store was no longer an adult bookstore because he had added more lingerie, other clothing and other nonadult items to the inventory. He estimated that more than 15 percent, but less than 50 percent, of the store's merchandise was adult-themed. He testified he had overseen other stores in California and Nevada that had successfully complied with ordinances that specified fixed percentages of adult goods at between 15 and 50 percent. He conceded that between Blake's inspection of Déjà Vu on January 17, 2006, and the return of county personnel to the store in late April 2006, no substantial changes were made to the store. He also conceded that the mezzanine held "predominantly" adult items. Egizi, Déjà Vu's manager, also confirmed in trial testimony that the store looked about the same between January and April 2006.

A forensic certified public account, Brian Bergmark, testified that during the relevant time Déjà Vu derived 62.7 percent of its receipts, amounting to $304.984, from the sale of adult items.

The court found "overwhelming" evidence that between January 14 and April 27, 2006, Déjà Vu continued to be an adult business within the meaning of section 1110 in violation of the County's zoning ordinances. The court explained that Déjà Vu devoted a significant or substantial portion of its interior display space to the sale or rental of adult items, a significant or substantial portion of its stock-in-trade consisted of adult items, and a significant or substantial portion of its revenue was derived from adult items.

The court determined that since section 1110 was unquestionably applicable to Déjà Vu under any reasonable interpretation of section 1110's "significant or substantial portion" standard, it lacked standing to pursue its argument the provision was unconstitutionally vague on its face. The court nonetheless went on to find that on the merits the standard passed constitutional muster. The court also rejected Déjà Vu's "as applied" challenge to the constitutionality of section 1110. The court permanently enjoined Déjà Vu from operating an adult business at its current location and assessed civil penalties against it of $77,250 ($750 per day for 103 days).

DISCUSSION

I

Facial Challenge/Standing

A

Déjà Vu contends the trial court erred by finding it lacks standing to pursue a facial challenge to section 1110 under the First and Fourteenth Amendments.[3] The standing issue involves the court's factual determinations and thus it is subject to a substantial evidence standard of review. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1092.)

"A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an

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[3] The First Amendment provides that " 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' This Amendment is made applicable to the States by the Due Process Clause of the Fourteenth Amendment." (*Young, supra,* 427 U.S. at p. 52, fn. 1.) Under the First Amendment, the government may not restrict expression because of its message, its ideas, its subject matter or its conduct. (*Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92, 95-96 ["To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship"].) Obscenity, which is deemed "utterly without redeeming social importance," is not protected by the First Amendment and is subject to governmental regulation. (*Roth v. United States* (1957) 354 U.S. 476, 484-485.) The line between protected and unprotected expression, however, is finely drawn and often uncertain (*Speiser v. Randall* (1958) 357 U.S. 513, 525; *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 65-66), and thus the government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected [expression]." (*Bantam Books, Inc. v. Sullivan*, *supra*, at p. 66.)

individual. [Citation.] ' "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' " (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) A facial challenge is " 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid.' " (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 193, italics omitted.)

Déjà Vu asserts section 1110's "significant or substantial portion" standard was too vague and provided neither adequate notice to those subject to its restrictions nor adequate guidelines to those charged with its enforcement. Déjà Vu submits that the determination of whether a business is an adult business must be based on numerical criteria, such as the County's previous 15 percent rule or its current 25 percent rule.

Under a basic principal of due process, an enactment is void for vagueness if its prohibitions are not clearly defined. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Déjà Vu cites *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358, which explains: "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more

important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' [Citation.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " Déjà Vu cites evidence that the County's code enforcement officers received no training on what "significant and substantial portion" meant, and they interpreted the phrase differently.

In determining Déjà Vu lacked standing to pursue a void for vagueness claim, the trial court relied on *Young*, *supra*, 427 U.S. 50. In *Young*, the United States Supreme Court held that two operators of adult motion picture theaters lacked standing to bring First and Fourteenth Amendment facial challenges to " 'Anti-Skid Row' " ordinances that precluded the clustering of adult businesses because they acknowledged the ordinances applied to them under any scenario. (*Id.* at p. 54.) The court explained that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters propose to offer adult fare on a regular basis. . . . It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents." (*Id.* at p. 59 & fn. 16.)

Déjà Vu asserts *Young* is inapplicable because there, the theater operators conceded they intended to operate adult businesses, and Déjà Vu made no such concession and argued at trial that it was not an adult business at the relevant time, or at the least, it did not intend to be an adult business. It does appear that the standing issue ordinarily surfaces when there is no dispute as to whether a business falls within an

ordinance's definition of an adult business. (See, e.g., *City of Vallejo v. Adult Books* (1985) 167 Cal.App.3d 1169, 1175; *Genusa v. City of Peoria* (7th Cir. 1980) 619 F.2d 1203, 1209; *Illinois One News, Inc. v. City of Marshall, Illinois* (Ill.App. 2007) 477 F.3d 461, 465; *Gold Diggers, LLC v. Town of Berlin, Conn.* (D.Conn. 2007) 469 F.Supp.2d 43, 54.) These opinions, however, do not discuss the procedural posture of this case. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Here, there was a justiciable controversy at trial over whether Déjà Vu was an adult business within the meaning of section 1110. Contrary to Déjà Vu's position, though, that does not mean it maintained standing to pursue its facial challenge to section 1110 even after the trial court ruled it was unquestionably an adult business during the relevant period under any definition of "significant or substantial portion." "A litigant's standing to sue is a threshold issue to be resolved before the matter [here the facial challenge] can be reached on the merits." (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) Since the elements for standing "are not mere pleading requirements but rather an indispensible part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the *successive stages of the litigation*." (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561, italics added.) For a cause of action "to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233;

Medical Bd. of California v. Superior Court (2001) 88 Cal.App.4th 1001, 1008; *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813 [because standing goes to the existence of a cause of action, and the court's jurisdiction, "lack of standing may be raised by demurrer or at any time in the proceeding, including at trial or in an appeal"].)

Z.J. Gifts D-4, LLC v. City of Littleton (10th Cir. 2002) 311 F.3d 1220 (*Z.J. Gifts*), overruled on another point in *City of Littleton v. Z.J. Gifts D-4, LLC* (2004) 541 U.S. 774, 777-778, 784), demonstrates why the trial court's ruling here was correct. In *Z.J. Gifts*, the ordinance was substantively identical to section 1110. The ordinance defined " 'adult bookstore, adult novelty store, or adult video store' as a business that 'devotes a significant or substantial portion' of its floor space, inventory, or advertising to adult materials, or that obtains 'a significant or substantial portion' of its revenue from those materials." (*Z.J. Gifts, supra,* at p. 1228.) In its complaint, Z.J. Gifts alleged the ordinance infringed on its First Amendment rights, and also "that it did not intend to operate an 'adult business establishment' " as defined in the ordinance. (*Id.* at p. 1224.) The court, however, held Z.J. Gifts lacked standing to challenge the ordinance under the void for vagueness doctrine because the evidence presented in a summary judgment proceeding showed "the ordinance is 'unquestionably applicable' " to the owner. (*Id.* at p. 1229, fn. 6.) The result should be the same when the evidence is developed at trial instead of in a pretrial proceeding.

Substantial evidence supports the trial court's determination that Déjà Vu remained an adult business between January 14 and April 27, 2006, under any reasonable definition of "significant and substantial portion" since well more than 50 percent of the store's

display space was devoted to adult items. Blake testified that on January 17, 2006, 50 to 60 percent of the items on the first floor were adult and about 80 percent of the items on the mezzanine were adult. Déjà Vu conceded that nearly all merchandise in the mezzanine was of a sexual nature. Its own witness established that between January and April 2006, 95 percent of its videos and DVD's and 70 percent of its books were sexually-oriented. Déjà Vu conceded that the store remained essentially the same until late April 2006 when Déjà Vu began complying with the County's directions.

The plain meaning of "significant" is "a noticeably or measurably large amount" (Webster's Collegiate Dict. (10th ed. 1996, p. 1091), and the plain meaning of "substantial" is "considerable in quantity." (*Id.* at p. 1174.) A figure of more than 50 percent obviously meets those definitions, and Déjà Vu does not argue otherwise. (*Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 376 ["phrase 'substantial or significant portion' lacks clarity," but "if over half of a bookstore's stock is 'adult,' the adult portion is both substantial and significant"] (*Kuhns*), overruled on another ground in *People v. Superior Court* (*Lucero*) (1989) 49 Cal.3d 14, 28, fn. 10 (*Lucero*); *Dandy Co., Inc. v. Civil City of South Bend, County-City Complex* (Ind.App. 1980) 401 N.E.2d 1380, 1385-1386 [police officers' estimates that 50 to 80 percent of inventory was adult in nature clearly met "significant and substantial" test].)

Because Déjà Vu cannot establish it lacked notice or due process pertaining to the "significant or substantial portion" language it lacks standing to pursue a vagueness

argument. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (*Parker v. Levy* (1974) 417 U.S. 733, 756.)[4]

B

Déjà Vu also complains that section 1110's two categories of adult items (see *ante*, fn. 1) were vague. It points to evidence that enforcement officers interpreted the definitions somewhat differently, and submits that "[t]his lack of consistency among code enforcement officials is critical because the initial determination as to the *type* of merchandise subject to regulation as 'adult' must be made before the subsequent determination can be made as to whether the *quantity* of such merchandise crosses the 'significant or substantial portion' threshold." Déjà Vu complains that some items, such as oils, lotions, crotchless panties, see-through bras, vibrating sponges, feather boas, rubber duckies, collars and wristbands should not have been included in the inventory of adult items.

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4 Although we do not decide the issue, our research shows that many courts have concluded an adult business ordinance's "significant or substantial" language survives a facial challenge. (See, e.g., *Doctor John's, Inc. v. City of Roy* (Utah App. 2006) 465 F.3d 1150, 1159-1160; *World Wide Video, WA. v. City of Spokane* (9th Cir. 2004) 368 F.3d 1186, 1198-1199; *Mom N Pops, Inc. v. City of Charlotte* (W.D.N.C. 1997) 979 F.Supp. 373, 392, 393; *ILO Investments, Inc. v. City of Rochester* (8th Cir. 1994) 25 F.3d 1413, 1418-1419; *Cline v. City of Oklahoma City* (Okla.App. 1992) 839 P.2d 657, 658; *15192 Thirteen Mile Road, Inc. v. City of Warren* (E.D.Mich. 1985) 626 F.Supp. 803, 820. In *Lucero, supra,* 49 Cal.3d 14, 19, the California Supreme Court held that cities may zone the location of theaters when adult films "constitute a substantial portion of the films shown or account for a substantial part of the revenues." (Cf. *Ellwest Stereo Theater, Inc. v. Boner* (M.D.Tenn. 1989) 718 F.Supp. 1553, 1581; *City of Knoxville v. Entertainment Resources, LLC* (Tenn. 2005) 166 S.W.3d 650, 656-657.)

As the court noted, however, the enforcement officers generally agreed on most items. Déjà Vu cites no evidence to refute that finding. There is no indication that *less* than 50 percent of Déjà Vu's merchandise at the relevant time was adult-themed even under its interpretation of section 1110's categories of adult items. Accordingly, this issue does not affect our holding on the standing issue. The court properly determined section 1110 unquestionably applied to Déjà Vu under the "significant and substantial portion" test.

C

Nor may Déjà Vu assert standing on behalf of others to assert section 1110 was facially overbroad. In the First Amendment context, the Supreme Court has relaxed the general rule of standing to allow a challenge to the constitutionality of an ordinance affecting others. "This exception from traditional rules of standing . . . has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." (*Young*, *supra*, 427 U.S. at pp. 59-60.) However, if the ordinance's "deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' [citation] the litigant is not permitted to assert the rights of third parties." (*Id*. at p. 60.)

In *Young*, the court concluded the zoning ordinances would not have a significant deterrent effect on the exhibition of movies protected by the First Amendment. The court explained that the "only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to [be]

'characterized by an emphasis' on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state courts.' " (*Young, supra,* 427 U.S. at p. 61.) Further, the court noted "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." (*Ibid.*)

In *Z.J. Gifts,* the court held the *Young* rationale applied to an ordinance substantively identical to section 1110. The court explained: "Adult businesses covered by Littleton's ordinance are, by definition, likely to carry materials that border on pornography. Stated simply, in light of *Young,* Littleton's ordinance does not have a 'real and substantial' deterrent effect upon 'legitimate expression.' " (*Z.J. Gifts, supra,* 311 F.3d at p. 1229.) Further, the court found the " 'significant or substantial' language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems. A common method of narrowing construction has been to develop a percentage that will act as a guide as to what constitutes 'significant or substantial.' " (*Ibid.*) We agree with *Z.J. Gifts'* assessment. Further, the County has already amended section 1110 to delete the "significant and substantial" standard and replace it with a 25 percent standard, and thus the former provision can no longer affect any business.

II

"As Applied" Challenge

"An as applied challenge may seek . . . relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals. . . . It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1084.)

Déjà Vu contends the court erred by rejecting its "as applied" challenge to section 1110. Déjà Vu argued the "significant and substantial portion" language was vague, and the County provided no guidance as to its meaning and county personnel differed on what the language meant.

Because more than 50 percent of Déjà Vu's merchandise was adult-themed, it was in clear violation of the "significant and substantial portion" standard and it should not have been confused on that point. Further, given the clear violation of section 1110 the individual beliefs of enforcement officers as to the meaning of the language did not impact the County's decision to pursue Déjà Vu or the ultimate outcome. Déjà Vu made no showing section 1110 was applied in an unconstitutional manner. As the court explained, "Déjà Vu had the full 3 1/2 year amortization period in which to prepare the change to the nature of its business to avoid violating the law, but failed to do so by January 14, 2006. [Déjà Vu] did not request any clarifications or guidance regarding

compliance with the ordinance until April 2006, after the County initiated contempt proceedings." The court's ruling was based on ample evidence.

III

Permanent Injunction/Revenue Criteria

Déjà Vu contends the permanent injunction is invalid because the prospective use of revenue to regulate a business engaged in free expression violates the First Amendment and due process rights. Section 1110's current definition of an adult business currently includes one that derives 25 percent or more of its revenue from specified adult items. Déjà Vu asserts that since section 1110 does not specify the time within which the measure is to be made, by the day, week, month or year, it is left to speculate on the matter. Further, Déjà Vu cannot control what customers purchase, and thus on a given day all of its sales may be of adult items, but over a longer period the sale of adult items may only be a small fraction of overall sales. In Déjà Vu's view, the revenue criterion is unnecessary because the definition of an adult business can be based solely on the quantity of adult items on display. This issue is based on undisputed facts and is subject to our independent review. (*Dobos v. Voluntary Plan Administrators, Inc.* (2008) 166 Cal.App.4th 678, 683.)

Our high court has approved of the use of revenue as a measurement standard in the adult entertainment context. In *Lucero, supra*, 49 Cal.3d 14, the issue was how to define the term "use" necessary to make a theater an "adult motion picture theater" within the meaning of a zoning ordinance. (*Id.* at p. 18.) The court rejected the argument that a "preponderance" standard was constitutionally compelled. Rather, it adopted the

following constitutional standard: "cities may zone the location of theaters that show, on a regular basis, films characterized by an emphasis on the 'specified sexual activities' or 'specified anatomical areas' identified in the ordinance, where such films constitute a substantial portion of the films shown or account for a *substantial portion of the revenues derived from the exhibition of films*." (*Id.* at p. 19, italics added.) The court elaborated that "although our definition is not exact, it is 'reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary.' [Citations.] We emphasize that Long Beach is free to further define the standard – for example, by making reference to a percentage of films shown, or the percentage of revenue received by the adult entertainment business." (*Id.* at p. 28, fn. 9.)

Déjà Vu asserts the *Lucero* standard is only dicta because it does not include a discussion of any potential problems with a revenue standard. The opinion states, however, "we adopt a constitutional standard," and then specifies the above standard, which includes revenue. (*Lucero, supra,* 49 Cal.3d at p. 19.) Déjà Vu asserts *Lucero* is inapplicable because categorization based on revenue may be appropriate for a movie theater, but it is inappropriate for a retail store because the retailer cannot control what merchandise its customers buy. A theater offering both adult and nonadult films, however, could raise a similar argument. We find it unpersuasive.

In any event, even without *Lucero,* we agree with the trial court. It relied on *City of Ramsey v. Holmberg* (Minn.App. 1996) 548 N.W.2d 302, in which an ordinance defined an adult business in part as one in which "more than 20% of gross receipts are derived from an adult use." The owner argued the language was vague because "it does

not specify a time period during which the 20% figure is to be calculated." (*Id.* at p. 306.) The court rejected the argument, explaining the "lack of a definite time period in which to apply the terms of the ordinance is not fatal." (*Id.* at p. 307.) The *Ramsey* court cited *Humenansky v. Minnesota Board of Medical Examiners* (Minn.App. 1994) 525 N.W.2d 559, which held that a "statute should not be invalidated as vague merely because it is possible to imagine some difficulty in determining whether certain marginal fact situations fall within its language." (*Id.* at p. 564, citing *United States v. National Dairy Products Corp.* (1963) 372 U.S. 29, 32.)

Here, there is no suggestion there will be any actual difficulty in implementing the revenue portion of section 1110. There is no evidence the County intends to monitor Déjà Vu's revenue from adult merchandise on a daily or weekly basis, which may unfairly skew the results. At trial, for instance, the parties were allowed to present evidence pertaining to the entire three and one-half month period in question.

Déjà Vu's reliance on *Kuhns, supra,* 128 Cal.App.3d 369, is misplaced. In *Kuhns,* the municipality approved a permit for a bookstore on the condition it would not offer adult items as " 'a substantial or significant portion of its stock in trade,' " and on the condition that "[s]ales records are to be kept in two categories of regular and 'adult' sales and are to be submitted for review on a bimonthly basis." (*Id.* at p. 373.) We held the requirement of submitting sales receipts on a bimonthly basis was not in the furtherance of the police power and served no legitimate purpose. We noted the "store is limited in the quantity of adult materials it may offer for sale to the public." (*Id.* at p. 377.) The opinion does not state that an adult business ordinance may never be based on revenue.

The County's expert accountant testified that "revenue is the primary basis I have seen" for determining the true nature of a business.

Alexander v. Minneapolis (D.C. Minn. 1982) 531 F.Supp. 1162, is also unhelpful. In *Alexander,* a zoning ordinance defined an adult bookstore or movie theater as deriving "forty (40) percent or more of its dollar volume in trade" from adult materials. (*Id.* at p. 1165.) The court struck down the 40 percent provision because it "is enforceable on a *daily basis*. The evidence showed that it would be financially unfeasible and impractical for theaters to operate with 61 percent of daily showings in general films and the balance in adult films. For bookstores the sale of less than 40 percent in dollar volume trade could never be assured under a system of daily enforcement. On any given day a bookstore which sold an adult magazine as its first sale of the day would risk violation of the ordinance if it didn't manage to sell nonsexually-oriented materials for the rest of the day." (*Id.* at p. 1171, italics added.) The court found the ordinance was unconstitutional as applied. (*Id.* at p. 1173.)

In contrast, section 1110 does not impose a daily requirement impossible or impracticable for Déjà Vu to meet. Again, there is no suggestion the County has or intends to apply the standard to Déjà Vu in an unfair manner.[5]

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5 We note that California uses a revenue criterion in determining whether a business selling alcohol is subject to certain regulations. (See, e.g., Bus. & Prof. Code, §§ 23396.1, subd. (b)(3), 24045.17, subd. (d), 25503.22, subd. (2).)

DISPOSITION

The judgment is affirmed. The County is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

HALLER, J.

AARON, J.